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In The

Supreme Court of the United States

October Term, 1973

No. 73 4471

WALLACE CUTLER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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In The

Supreme Court of the United States

October Term, 1972

No.

Wallace Cutler,

Petitioner,

v.

United States of America.

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The petitioner, WALLACE CUTLER, petitions that a writ of certiorari issue to review a final decision of the United States Court of Claims, (Appendix D, *infra)* granting respondent's cross-motion for summary judgment and holding that petitioner's claim to the Department of Defense for monetary restitution was properly rejected.

Opinion Below

The opinion of the United States Court of Claims granting respondent's cross-motion for summary judgment appears in Appendix D, *infra*.

Jurisdiction

The decision of the United States Court of Claims (Appendix D, *infra)* is dated June 20, 1973. Jurisdiction is conferred on the Court by 28 U.S.C. 1255.

Questions Presented

1. Whether petitioner was denied due process of law as a result of having to comply with a new procedure required by Department of Defense Directive 5220.6, December 7, 1966, not authorized by Congress or the President which, in effect, abrogates petitioner's substantive rights which vested under former Department of Defense Directive 5220.6, February 2, 1955?

2. Whether as applied to claims for reimbursement for unjustified suspensions of security clearance under Department of Defense Directive 5220.6, February 2, 1955, the retroactive application of a procedural precondition (Department of Defense Directive 5220.6, December 7, 1966), providing that, "Any claim shall be forever barred unless it is filed within one year after the date such claim first accures, or within one year of the final disposition of the case, whichever is later", is unreasonable and, consequently, unconstitutional?

Statement of the Case

This case once again brings before this Court procedural requirements of the Department of Defense's Industrial Personnel Security Clearance Program not authorized by Congress or the President which operate to

deprive petitioner of property without due process of law in contravention of the Fifth Amendment. *Greene v. McElroy*, 360 U.S. 474 (1959). *Greene* ruled that in the absence of explicit authorization from either the President or Congress the Industrial Personnel Security Clearance Program was not empowered to deprive petitioner of his job in a proceeding in which he was denied the constitutional safeguards of confrontation and cross-examination.

Here, petitioner was employed by Emerson Radio and Phonograph Corporation on June 28, 1957, when he was notified that the Defense Department Industrial Personnel Security Board had suspended his interim security clearance and decided that granting him access to material classified Secret pursuant to Executive Order 10501 would not be clearly consistent with the national interest. This action was taken pursuant to the Industrial Personnel Security Review Regulation, Department of Defense Directive No. 5220.6, dated February 2, 1955. As a direct result of this action by the Defense Department Industrial Personnel Security Board, plaintiff, on August 16, 1957, lost his employment with Emerson Radio and Phonograph Corporation as Field Engineer.

On September 17, 1957, and in response to his letter of September 9, 1957, requesting a reconsideration, petitioner was granted a hearing before the New York Industrial Personnel Security Hearing Board and thus began an expensive, arduous, emotionally exhausting ten year battle to receive the clearance he maintained he deserved.

Finally, on June 22, 1966, petitioner was advised that the granting of authorization to petitioner for access to information classified Secret pursuant to Executive Order 10501, (this order authorized Department of Defense Directive 5220.6, February 2, 1955), is clearly consistent with the national interest.

Statement of the Case

Once that final determination had been made with respect to his security clearance, on April 21, 1972, within the six-year statutory limitation period of 28 U.S.C. Section 2501 petitioner filed a claim with the Department of Defense for monetary restitution pursuant to Department of Defense Directive 5220.6, February 2, 1955, paragraph 26, (App. E) in the amount of $54,045.75. This claim was rejected on May 5, 1972, on the ground that petitioner had failed to comply with the new Department of Defense Directive 5220.6, December 7, 1966, paragraph X, subparagraph F, (App. F) which provides that "Any claim shall be forever barred unless it is filed within one year after the date such claim first accures, or within one year of the final disposition of the case, whichever is later".

Shortly thereafter and still within the statutory limitation period, petitioner filed suit in the United States Court of Claims. The Court of Claims held that although Petitioner would be entitled under *Greene v. United States*, 376 U.S. 149 (1964), to his substantive rights under the 1955 directive (App. F 21a) and although the 1955 directive imposed no time limitation on the filing of the administrative claim for reimbursement, petitioner would still have to comply with the procedural precondition of the 1966 directive.

Reasons for Granting the Writ

1. Petitioner was denied due process of law in contravention of the Fifth Amendment by the retroactive application of the 1966 directive's procedural precondition not authorized by Congress or the President which abrogates petitioner's substantive rights acquired under and in accordance with the 1955 directive.

In *Greene v. McElroy*, supra, this Court dealt with the issue of procedural requirements of the Industrial

Personnel Security Clearance Program which abrogated petitioner's substantive rights. In deciding *Green v. McElroy*, supra, the Court looked for express authorization from either Congress or the President for those precedural requirements that abrogated petitioner's substantive rights. Finding no express authorization by either Congress or the President this Court held that petitioner must be accorded constitutional procedural safeguards. Responding to this decision Department of Defense Directive 5220.6, July 28, 1960, provided for the constitutional procedural safeguards of cross-examination and confrontation of witnesses. This was done pursuant to express authorization in Executive order No. 10865 which authorized Department of Defense Directive 5220.6, July 28, 1960 (App. G).

On December 7, 1966, Department of Defense Directive 5220.6, superseded and cancelled Department of Defense Directive 5220.6, July 28, 1960. The 1966 directive required a new procedural hurdle in order that a petitioner may protect his substantive rights. This is not a shorter statute of limitations but a procedural precondition that, "Any claim shall be forever barred unless it is filed within one year after the date such claim first accures, or within one year of the final disposition of the case, whichever is later". Although a new Executive Order (No. 10909) authorized the 1966 directive, it did not authorize this new procedural preconsition (App. H). When applied to petitioner's case this procedural precondition operates retroactively for it deprives petitioner of his substantive right to reimbursement which he acquired under and in accordance with the 1955 directive.

Although the decision of this Court regarding the constitutionality of statutes and regulations which operate retroactively are contradictory, there is a presumption that retroactive statutes and regulations which abrogate vested

rights are unconstitutional. *Murray v. Gibson*, 15 How. 421 (1851); *Auffm'ordt v. Rasin*, 102 U.S. 620 (1810); *Chew Heong v. United States*, 112 U.S. 536 (1884); *Cook v. United States*, 138 U.S. 157 (1891); *Union Pac. R. Co. v. Laramie Stockyards Co.*, 231 U.S. 190 (1913); *Greene v. United States*, supra.

In a case like the one at bar where a statute or regulation operates retroactively and abrogates vested rights two criteria must be met before this Court will consider it constitutional. First, it is well established by this Court in a consistent line of cases from its earliest days that statutes will be construed as operating prospectively, unless an intention that they shall have retroactive effect is clearly expressed, and that they will not be given retroactive effect or construed to change the status of pending claims unless the legislative purpose so to do plainly appears. *United States v. Heth*, 3 Cranch 399 (1806); *United States Fidelity & Gas Co. v. United States*, 209 U.S. 306 (1908); *United States v. St. Louis S. F. & T. R. Co.*, 270 U.S. (1925); *United States v. Magnolia Petroleum Co.*, 276 U.S. 160 (1928); *Brewster v. Gage*, 280 U.S. 327 (1930); *Miller v. United States*, 294 U.S. 435 (1935); *Hassett v. Welch*, 303 U.S. 303 (1938); *Claridge Apts. Co. v. Commissioner of Int. Rev.*, 323 U.S. 141 (1944); *Greene v. United States*, 376 U.S. 149 (1964).

Second, if there is a clear mandate from Congress or the President that a given statute or regulation shall operate retroactively its constitutionality will depend upon the reasonableness of each individual application.

In petitioner's case the procedural precondition of the 1966 directive operates retroactively, abrogating his substantive rights. Executive Order 10909 which authorizes the 1966 directive does not authorize any prodecural precondition, let alone a retroactive operation of one. In fact, no authorization, either statutory or

through Executive Order, can be found to support the procedural precondition of the 1966 directive. This deprives petitioner of his substantive right without due process of law in contravention of the Fifth Amendment.

After losing his job in 1953 and after the decision in *Greene v. McElroy*, supra, petitioner Greene filed a claim for monetary reimbursement. The Department of Defense rejected his claim on the ground that he had to comply with the 1960 directive then in effect, rather than the 1955 directive under which his right to reimbursement accrued. Once again, Greene brought his case to this Court which decided in *Greene v. U.S.*, supra:

> Thus the Government's argument necessarily requires that the 1960 regulation be given retroactive application. As the Court said in *Union Pac. R. Co. v. Laramie Stockyards Co.*, 231 U.S. 190, 199, 101, "the first rule of construction is that legislation must be considered as addressed to the future, not to the past . . . and a retrospective operation will not be given to a statute which interferes with antecedent rights . . . unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature'". Since regulations of the type involved in this case are to be viewed as if they were statutes, this "first rule" of statutory construction appropriately applies and under the circumstances, it would be unjustifiable to give the 1960 regulation retroactive effect. 376 U.S. at 160.

The same reasoning is applicable to petitioner's case.

In *Margolin v. United States*, 175 Ct. Cl. 768 (1966), Margolin was denied security clearance on May 18, 1954. On May 12, 1961, after pursuing his administrative remedies, his security clearance was finally reinstated.

Margolin then filed a claim for reimbursement pursuant to paragraph 26 of Defense Department Directive 5220.6, February 2, 1955. In *Margolin* the government argued that the 1960 directive should apply to Margolin's claim—in effect arguing for retroactive application of a subsequent Defense Department Directive. The Court of Claims was in agreement with and adopted the opinion and recommendation for conclusion of law of the trial commissioner. On the basis of *Greene v. United States*, supra, the Court held that Margolin was entitled to reimbursement pursuant to the 1955 directive.

Although the government tries to distinguish the case at bar from *Margolin* by noting that Margolin's claim actually accrued under the 1953 directive and, consequently, that the decision in *Margolin* itself represents a retroactive application of the 1955 directive, this is a preversion of logic that has the cart leading the donkey. The government fails to point out that the 1953 directive and the 1955 directive are essentially the same with respect to both substantive rights and procedural regulations. Consequently, it made no practical difference to petitioner in *Margolin* whether the 1955 directive was applied 'retroactively'. The important question there was whether the 1960 directive which contained new and different substantive rights and procedural regulations could be retroactively applied. The Court of Claims held that Margolin's claim should have been processed according to the 1955 directive, rather than retroactively applying the 1960 directive. In fact, the case at bar is on all fours with *Margolin*.

If the Department of Defense were allowed to give new Department of Defense directive retroactive application to claims which accrued years before under former directives it would leave petitioner totally at the mercy of the changing regulations of the Department of Defense. It would be possible for a regulation promulgated long after

the commencement of these lengthy administrative procedures to disallow petitioner's recovery despite the fact that the regulation in effect at the time of the commencement of his difficulties would have allowed him full restitution upon a favorable determination of his claim. Petitioner would be placed in the position of having to spend considerable time, money and emotional energy pursuing the regulations in effect when his cause of action accrued and then holding his breath in the hope that no new regulation would be promulgated before a final determination was made. This deprives petitioner of a substantive right without due process of law in contravention of the Fifth Amendment.

2. As applied to claims for monetary reimbursement for unjustified suspensions of security clearance the unauthorized retroactive application of a procedural precondition providing that, "Any claim shall be forever barred unless it is filed within one year after the date such claim first accrues, or within one year of the final dispositon of the case, whichever is later", is unreasonable, and consequently, unconstitutional.

If there is a clear mandate from Congress or the President that a given statute or regulation shall operate retroactively its constitutionality will depend upon the reasonableness of each individual application. *Terry v. Anderson*, 95 U.S. 628 (1877); *Ochoa v. Hernandes y Morales*, 230 U.S. 139 (1913).

In deciding the reasonableness of Department of Defense Directive 5220.6, December 7, 1966, procedural precondition of a new year limitation for filing claims, it is imperative that one understand the prolonged, complicated process claimants must go through to obtain reimbursement under the Industrial Personnel Security Clearance Program.

Reasons for Granting the Writ

Once a petitioner has lost his job, due to a suspension of his security clearance, the first step in obtaining monetary reimbursement is to get his security clearance reinstated. This is an arduous process prolonged by the Industrial Personnel Security Clearance Program's own procedures. Once his security clearance is reinstated, petitioner must then file a claim for the difference in salary between his former job and the jobs he was subsequently forced to take. As the government points out, this itself is a complicated task. Petitioner must first prove that it was his loss of security clearance that resulted in his termination from his job. Then, with metriculous detail he must compute the salary he made for each subsequent job he held during the period of unjustified suspension and deduct it from the amount he would have made had he kept his former job. It is important to note here that when one's skills lie in an area where they are demanded almost solely by defense contractors the loss of his security clearance, in effect, precludes him from performing his chosen skill. Consequently, during the period of suspension, petitioners are often forced to hold a variety of low paying jobs in businesses that are often of a more transitory nature than government defense contractors. Thus, records, copies of payroll checks, etc., are often difficult to obtain. The 1966 directive's procedural precondition that petitioner must file his claim within one year after the date it first accrues or within one year of the final disposition of his case or be forever barred is thus unreasonable in cases under the Industrial Security Personnel Clearance Program.

The following three cases are prime examples of the arduous complicated task of appealing an adverse decision through the Industrial Personnel Security Clearance Program. In *Greene v. United States*, supra, on November 21, 1951, the Army-Navy-Air Force Personnel Security Board, (PSB), advised Engineering and Reasearch Corporation, (ERCO) that the companies' clearance for

access to classified information was in jeopardy because of a tentative decision to deny their vice president, petitioner Greene, access to classified defense information and to revoke his security clearance. Greene was forced to take an "extended furlough" until the PSB made a definite decision. On December 11, 1951, the PSB revoked Greene's security clearance. Greene then began the arduous, complicated process of appeal through the Industrial Personnel Security Clearance Program. Clearly, as vice president of ERCO, it was in Greene's best interest to obtain clearance as fast as possible and, consequently, he obtained counsel and began pursuing the processes of appeal. After lengthy correspondence and meeting various procedural obstacles, Greene obtained rehearings of his case on January 23, 1952, April 25, 1954, and September 16, 1955. After the 1954 rehearing and fed up with what seemed to be an unending appeal process Greene filed a complaint in United States District Court for the District of Columbia which led to the decision in this Court on April 1, 1959, in *Greene v. McElroy*, supra. After filing his claim for monetary reimbursement Greene met new obstacles and finally on February 17, 1964, in *Greene v. United States*, supra, obtained the legal remedy he began seeking when his security clearance was unjustifiably denied on November 21, 1951.

In *Margolin v. United States*, supra, petitioner Margolin lost his security on May 18, 1954. Margolin began the appeal process. He obtained a reconsideration of his case in October, 1958, and his clearance was finally granted on May 12, 1961. His claim for monetary reimbursement was denied and Margolin took his case to the United States Court of Claims. Finally, on May 13, 1966, he obtained his legal remedy.

In the instant case petitioner Cutler was denied security clearance on June 28, 1957. Cutler obtained a reconsideration of his case on September 17, 1957,

January 31, 1958, May 17, 1961, April 11, 1962, December 7 and 8, 1965, and January 17, 18, and 19, 1966. Finally on June 22, 1966 his clearance was granted.

Due to the Industrial Personnel Security Clearance Program's complicated procedures in the above three cases the average time spent in appealing, and, consequently, in having to find and hold other employment, was 8 years. (Greene: 1951-1959; Margolin 1954-1961; Cutler 1957-1966). After a process that long and complicated, when petitioner still has not begun to obtain the necessary documents in order to file his claim for monetary reimbursement, a procedural recondition that requires him to do so within one year is unreasonable and, hence, unconstitutional. *Terry v. Anderson*, supra; *Ochoa v. Hernandes y Morales*, supra.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

STANLEY FAULKNER and
FAULKNER & SCHMIDT
Attorneys for Petitioner

Certificate of Service

I hereby certify that I have this day served the within document upon all parties of record in this proceeding by mailing via first class mail, postage prepaid, a copy of each party. I further certify that I have this day mailed to the Attorney General of the United States and the Solicitor General of the United States copies of this document.

Dated: New York, New York
August
1973

Stanley Faulkner

Appendix A

Petition

In The

United States Court Of Claims

No. 237-72

Wallace Cutler,

Plaintiff,

v.

United States of America,

Defendant.

Petition

To the Honorable, The Court of Claims:

The plaintiff respectfully represents:

1. The jurisdiction of this Court is predicated upon 28 United States Code Section 1491.

2. The plaintiff, from August 8, 1955, to August 16, 1957, was continuously employed as a Field Engineer by Emerson Radio & Phonograph Corporation, 701 Lamont Street, N.W., Washington, D.C.

3. That on June 28, 1957, plaintiff was notified that the Defense Department Industrial Personnel Security Board has decided that granting him access to material classified Secret pursuant to Executive Order 10501 would not be clearly consistent with the national interest.

4. That as a direct result of this action by the said Defense Department Industrial Personnel Security Board plaintiff, on August 6, 1957, lost his employment with Emerson Radio & Phonograph Corporation as a Field Engineer.

5. Thereafter, and on or about September 9, 1957, plaintiff in a letter to the Office of Industrial Personnel Security Review attempted to clarify and respond to allegations made in the Statement of Reasons and petitioned for a reconsideration of the aforementioned determination of the Industrial Personnel Security Screening Board.

6. That on or about September 17, 1957, plaintiff was granted a hearing before the New York Industrial Personnel Security Hearing Board.

7. That on or about October 9, 1957, the New York Industrial Personnel Security Hearing Board issued an Amended Statement of Reasons pursuant to Item 19i, Department of Defense Directive, No. 5220.6 dated February 2, 1955.

8. That on January 31, 1958, plaintiff was granted another hearing before the New York State Industrial Personnel Security Hearing Board.

9. That on or about April 7, 1958, plaintiff was notified by the Office of Industrial Personnel Security Review that the New York Industrial Personnel Security Hearing Board, after reconsideration and in light of the hearings held on September 17, 1957, and January 31, 1958, had determined that granting his "access to classified defense information is not clearly consistent with the interests of national security."

Petition

10. That on or about August 14, 1959, plaintiff requested that the Office of the Industrial Personnel Security Review set aside and reverse the April 7, 1958, determination of The New York Industrial Personnel Security Hearing Board. The request was made pursuant to Section 22 (c)(2) of The Industrial Personnel Security Review Regulations on the ground of newly discovered evidence.

11. On or about May 17, 1961, the Office of Industrial Personnel Access Authorization Review set aside the aforementioned April 7, 1958, determination of the New York Industrial Personnel Security Hearing Board "and all subsequent administrative actions within the Department of Defense predicated thereon".

12. That on or about April 11, 1962, plaintiff was granted a hearing with the Industrial Personnel Access Authorization Screening Board.

13. That on or about October 9, 1963, following the aforementioned April 11, 1962, hearing, the Industrial Personnel Access Authorization Screening Board "concluded, on all the information available to it, that the granting of authorization for [plaintiff's] access to information classified Secret is not warranted." This determination included a Statement of Reasons.

14. That on or about March 12, 1964, plaintiff endeavored by letter to respond to the determination of the Industrial Personnel Access Authorization Screening Board and to clarify once again the Statement of Reasons set forth. Plaintiff requested a personal appearance before a Field Board.

Petition

15. That following this request of March 12, 1964, plaintiff was granted the right to an appearance before the New York Personnel Access Authorization Field Board; and that on or about December 17, 18 and 19, 1966, plaintiff did in fact appear before the aforementioned New York Field Board.

16. That following plaintiff's appearances before the New York Industrial Personnel Access Authorization Field Board his entire record was referred to the Central Indistrial Personnel Access Authorization Board for final determination.

17. That on or about June 22, 1966, plaintiff was advised that "[a]fter considering all of the information available to it, including Mr. Cutler's answer to the Statement of Reasons, the complete record of the proceeding before the New York Industrial Personnel Access Authorization Field Board, and the Field Board Report, *the Central Board has now determined that the granting of authorization to [plaintiff] for access to information classified Secret pursuant to Executive Order 10501 is clearly consistent with the national interest.*" (Emphasis supplied)

18. In accordance with aforesaid Security Program and Department of Defense Directive 5220.6 (February 2, 1955) plaintiff is entitled to monetary restitution for any loss of earnings which he suffered as a result of the action of the Defense Department in denying him a security clearance.

19. No other action has been had on this claim in Congress or by any department of the Government or in any judicial proceeding.

20. Plaintiff is the sole owner of the claim herein sued upon and no assignment or transfer of the claim or any part thereof or any interest therein has been made.

Petition

21. There is, therefore, due and owing plaintiff by the defendant a sum equal to the earnings he would have made with Emerson Radio & Phonograph Corporation from August 16, 1957, to June 22, 1966, less the amount of his interim net earnings.

WHEREFORE, plaintiff demands judgment against the United States as set forth in paragraph 21 above, for the sum of Fifty-Six Thousand Five Hundred Seventy-Five and 32/100 ($56,575.32) Dollars and for such other and further relief as may be just and proper.

Dated: May 30, 1972

FAULKNER & SCHMIDT

s/Stanley Faulkner

STANLEY FAULKNER Attorneys for Plaintiff 9 East 40th Street New York, New York 10016

Appendix B

Answer

In the United States Court of Claims

Wallace Cutler, *Plaintiff,*

vs.

The United States, *Defendant.*

Defendant's Answer and Affirmative Defenses

For its answer to plaintiff's petition, defendant admits, denies and alleges as follows:

1. The allegation of paragraph 1 is a conclusion of law, not requiring an answer, but to the extent it is deemed an allegation of material fact, it is denied.

2. Admits that from approximately August, 1955 to August 2, 1957, plaintiff was so employed; denies for lack of knowledge or information sufficient to form a belief as to the truth thereof the allegation as to the date in August, 1955, that plaintiff commenced said employment.

3. Admits the allegations of paragraph 3.

4. Admits that on August 2, 1957, plaintiff's said employment with Emerson ceased. Denies all remaining allegations of this paragraph.

5. Admits that by letter dated September 9, 1957, plaintiff submitted his response to the Statement of Reasons, issued by the Industrial Personnel Security

Screening Board, setting forth the reasons for denying him authorization for access to classified information, which had been sent to him by letter dated June 28, 1957. Avers that said letter speaks for itself. Denies all remaining allegations of this paragraph for lack of knowledge or information sufficient to form a belief as to the truth thereof.

6. Admits and avers that on September 17, 1957, a hearing was held before the New York Industrial Personnel Security Hearing Board.

7. Admits the allegations of paragraph 7.

8. Admits the allegations of paragraph 8, except the designation of the Board, the correct designation of which is the "New York Industrial Personnel Security Hearing Board."

9. Admits the allegations of paragraph 9.

10. Admits the allegations of paragraph 10, except the citation of the said regulation, the correct citation of which is paragraph 22(c)(1), not 22(c)(2).

11. Admits the allegations of paragraph 11.

12. Denies the allegations of paragraph 12 and in lieu thereof states as follows: On April 11, 1962, the Industrial Personnel Access Authorization Screening Board conducted an interview with plaintiff pursuant to paragraph IV.C.2.c. of the regulations then in effect, Department of Defense Directive 5220.6, dated July 28, 1960.

13. Denies the allegations of paragraph 13 and in lieu thereof states as follows: By letter dated October 9, 1963, plaintiff was notified that the Industrial Personnel Access

Authorization Screening Board had concluded that the granting of authorization for his access to information classified Secret was not warranted. Said letter forwarded to him a Statement of Reasons, setting forth in detail the reasons for the Board's action. It also notified him that the Board's conclusion was not final; advised him of procedures available to him if he wished to pursue the matter further; and furnished him a copy of the applicable regulations, Department of Defense Directive 5220.6, dated July 28, 1960.

14. Admints that by letter dated March 12, 1964, plaintiff submitted his reply to the aforesiad Statement of Reasons and requested a hearing. Denies for lack of knowledge or information sufficient to form a belief as to the truth thereof all remaining allegations of this paragraph.

15. Admits the allegations of paragraph 15 except the allegation as to the dates of appearance before said Board, the correct dates of which are December 7 and 8, 1965, and January 17, 18, and 19, 1966.

16, 17. Admits the allegations of paragraphs 16 and

18. Denies the allegations of paragraph 18.

19. Denies the allegations of paragraph 19. Answering further, defendant avers that the same claim asserted in this suit, in an almost identical amount, namely, $54,045.75, was submitted to the Department of Defense by plaintiff's attorney by letter dated April 21, 1972, and denied by it by letter to him dated May 5, 1972. Said claim was also submitted to the General Accounting Office by plaintiff's attorney by letter dated April 21, 1972; forwarded by that office to the Department of Defense; and denied by it by letter to plaintiff's attorney dated May 15, 1972.

Answer

20. Denies the allegations of paragraph 20 for lack of knowledge or information sufficient to form a belief as to the truth thereof.

21. Denies the allegations of paragraph 21.

22. Except as herein admitted, denied or qualified, denies all allegations of material fact contained in the petition.

Affirmative Defenses

23. Plaintiff fails to state a claim upon which relief can be granted.

24. Plaintiff's claim is barred by his failure to timely file said claim with the Department of Defense. The applicable regulations of said Department, Department of Defense Directive 5220.6, dated December 7, 1966, effective January 6, 1967, provided for reimbursement of lost earnings of individuals who have suffered such a loss resulting directly from the suspension, revocation or denial of security clearance and who subsequently have been accorded such clearance; and further, that any such claim shall be forever barred unless it is filed within one year after the date on which said claim first accrues, or within one year of the final disposition of the case, whichever is later, or, with respect to claims filed under the prior directive and denied solely on the ground that the clearance determination which resulted in the loss of earnings was not unjustified, within one year after the effective date of the said regulation. (The aforesaid 1966 regulation cancelled and superseded the preceeding regulation, DOD Directive 5220.6, dated July 28, 1960; that regulation cancelled the prior regulation, DOD Directive 5220.6, dated February 2, 1955.)

Answer

25. Plaintiff's claim, irrespective of the regulation held applicable to it, is barred for failure to exhaust his administrative remedy.

26. If, for any reason, the Court holds that plaintiff is entitled to recover, proceedings in this Court should be suspended and plaintiff required to submit his claim to the Department of Defense for administrative determination of the amount due under the terms of the regulation held by the Court to be applicable to his claim.

WHEREFORE , Defendant demands that the petition be dismissed and that defendant be granted such other and further relief as may be just and proper.

HARLINGTON WOOD, JR.
Assistant Attorney General
Civil Division

LAWRENCE S. SMITH Attorney, Civil Division
Department of Justice

Appendix C
Amended Answer
In the United States Court of Claims

WALLACE CUTLER,

Plaintiff,

v.

THE UNITED STATES,

Defendant,

Defendant's First Amended Answer

For its answer to plaintiff's petition, defendant admits, denies and alleges as follows:

1-26. Defendant reiterates and reasserts paragraphs 1 through 26 of its Answer and Affirmative Defenses, filed August 4, 1972.

27. Plaintiff's claim is barred by laches, almost five years having elapsed from the date of the granting of security clearance and the filing of a claim for montary restitution.

28. Plaintiff's claim is barred by the statute of limitations, pursuant to the Supreme Court decision in the case of *Greene* v. United States, *376 U.S. 149 (1964).*

WHEREFORE, defendant demands that the petition be dismissed and that defendant be granted such other and further relief as may be just and proper.

HARLINGTON WOOD, JR.
Assistant Attorney General
Civil Division

LAWRENCE S. SMITH Attorney, Civil Division
Department of Justice

Appendix D

Opinion of the United States Court of Claims

In the United States Court of Claims

No. 237-72

(Decided June 20, 1973)

WALLACE CUTLER v. THE UNITED STATES

Stanley Faulkner, attorney of record, for plaintiff. *Faulkner & Schmidt*, of counsel.

Lawrence S. Smith, with whom was *Harlington Wood, Jr.*, *Assistant Attorney General*, for defendant.

Before COWEN, *Chief Judge*, DAVIS, SKELTON, NICHOLS, KASHIWA, KUNZIG, and BENNETT, *Judges*.

ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

DAVIS, *Judge*, delivered the opinion of the court:

Wallace Cutler is a former defense-contractor employee who was allegedly discharged because the Defense Department initially denied him security clearance; some years later he was officially cleared. In this action he seeks monetary restitution under a departmental regulation providing for reimbursement by the Government of earnings lost by a contractor employee denied clearance if he later receives a favorable determination.[1]

Cutler's submission, in the form of a motion for summary judgment, is as follows: In 1957 he was employed by Emerson Radio and Phonograph Corporation, which did defense work,

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[1] For other cases under this series of regulations, *see Greene* v. *United States*, 376 U.S. 149 (1964); *Kanarek* v. *United States*, 161 Ct. Cl. 37, 314 F. 2d 802 (1963), *cert. denied*, 379 U.S. 838 (1964), 184 Ct. Cl. 125, 394 F. 2d 525 (1968), *cert. denied*, 394 U.S. 1013 (1969); *Margolin* v. *United States*, 175 Ct. Cl. 768 (1966).

as a field engineer working on classified matters. He held a confidential clearance from his employer but the company desired for him a higher grade of access to classified information, and therefore applied to the Defense Department for a "secret" rating. Late in June 1957 the Department denied him such access and suspended his interim security clearance. As a direct result, he says, he was discharged by Emerson in August 1957. Thereafter he tried for several years to have the Defense Department overturn this denial of clearance. After a series of proceedings, the Department, in June 1966, finally determined that the granting to him of authorization for access to secret information was clearly consistent with the national interest—and he was so informed at that time. He applied to the Department for monetary restitution in April 1972; this was denied the following month. He then brought this suit.

Defendant's cross-motion for summary judgment queries whether plaintiff has proved the basic fact that his separation from Emerson was the result of the Department's initial refusal of clearance. We do not consider whether this controversy over an essential factual element of the claim calls for a trial because we accept one of the Government's other defenses as dispositive. That complete bar is the plaintiff's failure to comply with the procedural requirement of the 1966 regulation, in effect when he filed his demand with the Defense Department in 1972, that claims for reimbursement be presented to the Department within one year after final clearance, or one year after the claim accrues (whichever is later).

On this point the decisive issue is whether, in this particular respect, plaintiff's claim is governed, as he asserts, by the 1955 directive which controlled when he was originally denied clearance in 1957, or by the 1966 regulation which had become the prevailing rule in 1972 when he filed his claim. The earlier regulation imposed no time limitation on the filing of the administrative claim for reimbursement.[2] The

[2] Paragraph 26 of Department of Defense Directive 5220.6, dated Feb. 2, 1955, 20 Fed. Reg. 1553, 1559:

"*Monetary Restitution.* In cases where a final determination is favorable to a contractor employee, the department whose activity originally forwarded the case to the Director [of the Office of Industrial Personnel Security Review] will reimburse the contractor employee in an equitable amount for any loss of

1966 directive[3] provided that "Any claim shall be forever barred unless it is filed within one year after the date such claim first accrues, or within one year of the final disposition of the case, whichever is later * * *." Mr. Cutler's case was finally determined, as we have noted, on June 22, 1966, and he did not present any claim to the Defense Department until April 21, 1972, almost six years later.

Greene v. *United States*, 376 U.S. 149 (1964), held that the complainant in *Greene* v. *McElroy*, 360 U.S. 474 (1959), was entitled to recover under the 1955 regulation, and not a later (1960) one which the Government sought to apply. But that case was quite different. The substantive requirements for restitution had been significantly altered in the subsequent directive, and the defendant insisted that the claimant had to meet the new substantive conditions which were more burdensome than the earlier prerequisites. Moreover, the 1960 directive was not even issued until six or seven months after Greene had formally made his claim to the Defense Department. It was in these circumstances that the Supreme Court held that the 1960 directive should not be applied retroactively, or utilized at all. The opinion pointed out that the major aspect of the new substantive requirements (of the 1960 provision) were wholly irrelevant to a determination of damages under the 1955 regulation, and "[i]n view of the substantial differences between the two regulations and in view of the additional factual determinations that would be relevant under the 1960 regulation but irrelevant under the 1955 regulation, we conclude the 1960 regulation does not provide a reasonable basis for reviewing petitioner's rights under the 1955 regulation." 376 U.S. at 163.[4]

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earnings during the interim resulting directly from a suspension of clearance. Such amount shall not exceed the difference between the amount the contractor employee would have earned at the rate he was receiving on the date of suspension and the amount of his interim net earnings. No contractor employee shall be compensated for any increase in his loss of earnings caused by his voluntary action in unduly delaying the processing of his case under this part."

[3] Paragraph X ("Reimbursement for Loss of Earnings"), subparagraph F, of Department of Defense Directive 5220.6, dated December 7, 1966, 31 Fed. Reg. 16188, 16198.

[4] The Court also said that "in this case the only available administrative procedure [under the 1960 regulation] entailed the burden of presenting the claim under an inapplicable and substantially revised regulation * * *." *Id.* (footnote omitted).

reasonable and appropriate procedural requirement.[7] There is no conflict with any Congressional legislation since Congress has not spoken in this area, and it is certainly sensible for the agency to erect some sort of time-fence. Otherwise it could be said that potential claimants had an unlimited period in which to seek relief from the Department, and thereafter a period of six years before suit had to be brought if the application was rejected.[8] Just as the authors of a regulation granting monetary redress may properly demand particularized and reasonable proof that the applicant fits within the covered class, so may they ask (if, as here, Congress has not acted) that he present his claim within a reasonable time of its accrual. Such a limitation advances the goal of prompt and adequate determination.[9]

The one-year period inserted in the 1966 directive—though half as long as the two-year period allowed by the Federal Tort Claims Act, 28 U.S.C. § 2401(b) (1970)—cannot be overthrown as unreasonably short. The original Tort Claims Act had a one-year statute of limitations (§ 420 of the Legislative Reorganization Act of 1946, Ch. 753, 60 Stat. 845), and the problems of claim-accrual, as well as of damages, are less complex under the regulation we are applying. In all probability a contractor employee would know, at the time his security clearance was restored or shortly thereafter,

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[7] The general rule is that "statutes of limitation may be passed where formerly there were none" (*Soper* v. *Lawrence Bros. Co.*, 201 U.S. 359, 367–68 (1906)), and existing limitation periods may be reduced while the time is still running (*Ochoa* v. *Hernandez*, 230 U.S. 139, 161–62 (1913)), provided that a reasonable time is left for the institution of an action before the bar falls. *Atchafalaya Land Co.* v. *F.B. Williams Cypress Co.*, 258 U.S. 190, 197 (1922).

[8] In view of the regulation's requirement of a mandatory administrative claim, the six-year limitations period of 28 U.S.C. § 2501 (1970) would not begin to run at least until after the administrative claim was filed. *See Friedman* v. *United States*, 159 Ct. Cl. 1, 8 *et seq.*, 310 F. 2d 381, 385 *et seq.* (1962), *cert. denied, sub. nom. Lipp* v. *United States*, 373 U.S. 932 (1963); *Harper* v. *United States*, 159 Ct. Cl. 135, 310 F. 2d 405 (1962).

[9] The present case is an illustration of the difficulties which can occur through a belated presentation. The parties dispute strongly whether Emerson's discharge of plaintiff has been shown to have been occasioned by the interim denial of clearance in 1957, but there now appear to be no or few records available by which to resolve that controversy—and quite understandably memories of the participants have dimmed. If plaintiff had filed within a shorter period after his clearance in June 1966, the means of settling this factual dispute might have then been available. His long delay in filing has obviously added to the problems of ascertaining the facts, and no adequate explanation of the delay has been offered. We need not decide, however, whether the Government's separate defense of laches should be sustained.

Significantly for the present case, the *Greene* opinion went on to say: "We do not suggest that a claimant, seeking damages under a former regulation, need not resort to administrative proceedings under a new regulation where the new regulation contains essentially the same substantive requirements as its predecessor." 376 U.S. at 163. We can assume that plaintiff Cutler would be entitled under *Greene*, *supra*, to the substantive requirements of the 1955 directive, insofar as they might differ from those of the 1966 regulation (or an intermediate 1960 version), but there is no basis in *Greene* for excusing him from compliance with the purely procedural precondition of the 1966 scheme that he file his claim within a period of one year.[5]

Greene is therefore no barrier, but is the time-limitation otherwise valid and applicable? It may be that, if plaintiff's claim were grounded in a contract, a statute, or the Constitution, and Congress had established a specified limitations period, an administrative agency could not bar relief by imposing an administrative time-limit shorter than that Congress had adopted. *Cf. Perry* v. *Allen*, 239 F. 2d 107 (C.A. 5, 1956).[6] But we have expressly held that any claim of a contractor employee in plaintiff's situation must flow, not from a contractual right, a statute, or the Constitution, but solely from the reimbursement provision of the Defense Department's own regulation. *Kanarek* v. *United States*, *supra*, 161 Ct. Cl. 37, 314 F. 2d 802 (1963). *Cf. Greene* v. *United States*, *supra*, 376 U.S. at 152, 164. The right to monetary restitution depends upon, and is created by, the regulation which offers that relief. In the absence of the restitution portion of the directive, there would be no monetary redress at all.

That being so, we see no reason why the Department which gave the right cannot decide to circumscribe it with this

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[5] *Margolin* v. *United States*, *supra*, 175 Ct. Cl. 768, applied the 1955 regulation to a claimant originally denied clearance in 1954 but there was no contention that an earlier directive should be used. Under *Greene*, the court did not apply the 1960 regulation. In *Kanarek* v. *United States*, *supra*, 184 Ct. Cl. 125, 394 F. 2d 525, the court also applied (without contest) the 1955 regulation to a claimant whose clearance was first suspended in 1954. In neither case was there a problem of late filing.

[6] With *Perry* v. *Allen*, compare *Iovino* v. *Waterson*, 274 F. 2d 41, 49 (C.A. 2, 1959), *cert. denied*, 362 U.S. 949 (1960).

whether the initial denial of clearance had caused him to lose earnings, and there would normally be less difficulty in appraising the monetary amount of such a loss than in determining damages for many kinds of injuries actionable under the Tort Claims Act. In any event, this plaintiff waited almost six years after his final clearance before filing, and it hardly lies in his mouth to challenge the one-year period as too abbreviated.

For the latter reason we are not troubled in this case by the fact that the 1966 regulation was adopted in December of that year, six months after Cutler's clearance in June 1966. The directive in effect in June was the 1960 regulation which, like the 1955 version, did not incorporate a time-limit on the filing of the claim. In *Greene* v. *United States*, *supra*, 376 U.S. at 155–56, 160, the Court thought it significant that that claimant had actually filed and asserted his claim to the Department under the prior (1955) regulation, and it was not until six or seven months later that the Secretary of Defense issued the new 1960 regulation on which the Government there relied. As the Court said, Greene's rights "matured and were asserted under the 1955 directive." 376 U.S. at 160. In contrast, Cutler did not assert his rights until long after the 1960 directive had been superseded; and, as we have pointed out, although his substantive rights may have matured under the 1960 regulation (in effect in June 1966) or the still earlier 1955 directive, there is no reason why a later procedural requirement cannot be invoked if it is reasonably applied. *Cf. Thorpe* v. *Housing Authority*, 393 U.S. 268, 281–83 (1969); *Lockheed Aircraft Corp.* v. *United States*, 192 Ct. Cl. 36, 47, 426 F. 2d 322, 328 (1970).

Perhaps a contractor employee cleared in June 1966 could object if his claim, filed for example in July 1967,[10] were rejected as untimely (*cf. Kellogg-Citizens Nat'l Bank* v. *United States*, 165 Ct. Cl. 452, 330 F. 2d 635 (1964)), but this plaintiff, though charged by law with knowledge of the time limitation in the 1966 directive, waited over five years after its issuance before he applied. In addition, there is not even a linguistic obstacle to reading the 1966 directive as giving all

[10] *I.e.*, seven months after the adoption of the 1966 directive in December 1966 but more than a year after clearance.

claimants, including plaintiff, a full year from December 1966 (or early January 1967 when the regulation became effective). The limitation bars a claim "unless it is filed within one year after the date such claim first accrues, or within one year of the final disposition of the case, whichever is later." It would not be difficult, in order to avoid injustice,[11] to hold that a restitution claim would not "first accrue", for the filing purposes of the 1966 regulation, until the effective date of that regulation which first imposed a time-limit where previously there was none. In sum, plaintiff had a reasonable time, after the 1966 regulation became operative, to present his claim—but he failed by the widest of margins.

Because of this belated filing of his application with the Department of Defense, contrary to the provisions of the 1966 regulation, plaintiff's claim was properly rejected and he is not entitled to recover. His motion for summary judgment is denied and the defendant's cross-motion is granted. The petition is dismissed.

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[11] This series of regulations is to be given an equitable construction to compensate employees whose security clearance has been improperly or wrongly denied. *Greene* v. *United States*, *supra*, 376 U.S. at 161.

U.S. GOVERNMENT PRINTING OFFICE: 1973

Appendix E

February 2, 1955
NUMBER 5220.6

Department of Defense Directive

SUBJECT Industrial Personnel Security Review Regulation

Attached for information and guidance is the Industrial Personnel Security Review Regulation, recommended by the Secretaries of the Army, Navy and Air Force, and approved by me on February 2, 1955.

This regulation becomes effective sixty calendar days after approval.

Secretary of Defense

* * *

26. *Monetary Restitution*

In cases where a final determination is favorable to a contractor employee, the department whose activity originally forwarded the case to the Director will reimburse the contractor employee in an equitable amount for any loss of earnings during the interim resulting directly from a suspension of clearance. Such amount shall not exceed the difference between the amount the contractor employee would have earned at the rate he was receiving on the date of suspension and the amount of his interim net earnings. No contractor employee shall be compensated for any increase in his loss of earnings caused by his voluntary action in unduly delaying the processing of his case under this regulation.

Department of Defence Directive 5220.6, February 2, 1955 (Applicable Sections)

27. Changes in Existing Directives

This regulation supersedes the Industrial Personnel and Facility Security Clearance Program approved by the Secretaries of the Army, Navy and Air Force on 4 May 1953, as amended, and the provisions of any other directives which are inconsistent with this regulation.

28. Effective Date

This regulation becomes effective sixty calendar days after it is approved by the Secretary of Defense.

RECOMMENDED BY:

s/Robert T. Stevens
Secretary of the Army
Date: February 2, 1955

sC. S. Thomas
Secretary of the Navy
Date: February 2, 1955

H. E. Talbott
Secretary of the Air Force
Date: Feburary 9, 1955

APPROVED BY:

C. E. Wilson
Secretary of Defense
Date: February 2, 1955

Appendix F

(STOCK REPRINT WITH
CH 1, 9/30/67 INCORPORATED)
December 7, 1966
NUMBER 5220.6

ASD(A)

Department of Defense Directive

SUBJECT Industrial Personnel Security Clearance Program

References:

(a) Executive Order 10865, Safeguarding Classified Information Within Industry, dated February 20, 1960, as amended by Executive Order 10909, (Appendix A)

(b) DoD Directive 5220.6, Subject:Industrial Personnel Access Authorization Review Regulation, dated July 28, 1960 (cancelled)

(c) DoD Directive 5220.22, DoD Industrial Security Program, dated July 30, 1965.

Under

(d) DoD Directive 5515.9, Settlement of Claims Under the Provisions of the Federal Tort Claims Act (28 U.S. Code; Sections 2671-2680) (Delegation to the SEcretary of the Army) dated November 15, 1961

(e) DoD Directive 5210.8, Policy on Investigation and Clearance of DoD Personnel for Access to Classified Defense Information, dated February 15, 1962

Department of Defence Directive 5220.6, December 7, 1966 (Applicable Sections)

I. PURPOSE

In accordance with reference (a) this Directive establishes the standard and criteria for making security clearance determinations when persons employed in private industry require access to classified defense information, and sets forth procedures which shall be followed for cases arising under the DoD Industrial Personnel Security Clearance Program (hereinafter referred to as the Program).

II. CANCELLATION

Reference (b) is hereby superseded and cancelled, effective 30 days from the date hereof

1. Where the applicant fails to give timely and proper notice to intent to contest the proposed suspension, it shall be ordered into effect.

2. Where the applicant gives timely and proper notice of intent to contest the proposed suspension, the case shall be referred to a Hearing Examiner for hearing and final determination. The hearing shall be governed by the provisions of this Directive to the extent applicable. The Examiner may adopt, modify, or reject the recommendation of the Screening Board. A determination by the Examiner under this Section shall be final and no further appeal may be taken.

C. Upon expiration of the period prescribed in any suspension ordered under this Section, the applicant may apply for reinstatement of his clearance by filing the necessary forms.

Department of Defence Directive 5220.6, December 7, 1966 (Applicable Sections)

X. REIMBURSEMENT FOR LOSS OF EARNINGS

A. An applicant may be reimbursed for a loss of earnings resulting directly from the suspension, revocation, or denial of his clearance provided (1) a final determination thereafter is made that it is clearly consistent with the national interest to grant him a clearance for access to classified information at least equal to that which was suspended, revoked, or denied, and (2) it is found to be fair and equitable for the Department of Defense to reimburse the applicant for all or a part of the loss of earnings.

B. It shall be considered fair and equitable, except as hereinafter provided, to reimburse any applicant who has suffered loss of earnings as a result of suspension, revocation, or denial of clearance when that clearance is, in the course of the timely exhaustion of remedies by the applicant, granted or restored. A claim for reimbursement may be denied when:

1. The subsequent determination to grant the clearance depends upon material facts withheld by the applicant, or where circumstances have changed since the suspension, revocation, or denial and the grant or restoration of the clearance; or

2. The suspension, revocation, or denial follows the applicant's failure to comply with procedural requirements.

C. Claims for reimbursement in Department of Defense cases shall be initiated by a petition filed

Department of Defence Directive 5220.6, December 7, 1966 (Applicable Sections)

by the applicant with the Assistant Secretary of Defense (Administration). The petition shall contain a detailed statement why fairness and equity require reimbursement, including the basis for the assertion that the loss of earnings is attributable to the suspension, denial, or revocation of the clearance, and shall identify the alleged errors of fact or judgment involved.

D. Claims for reimbursement in Agency cases shall be initiated by a petition filed by the applicant with the Agency concerned. At the request of the Agency Head concerned, the Department of Defense under its procedures will review the petition and furnish that Agency with a recommendation with respect to the merits of the petition. However, the Department of Defense is not responsible for payment of such claims.

E. When a case has been reopened under Section XI., below, and thereupon a determination favorable to the applicant is made, a request for reimbursement may be considered only where (1) the applicant exhausted all the administrative remedies available in the original proceeding, (2) the applicant made a full and complete disclosure during the original proceeding, and (3) the determination to grant or restore the clearance is not based upon circumstances occurring after the final denial or revocation.

F. The amount of reimbursement shall not exceed the difference between the earnings of the applicant at the time of the suspension, revocation, or denial, whichever is earlier, and the interim net earnings. No reimbursement shall be allowed for any period of undue delay resulting from the

Department of Defence Directive 5220.6, December 7, 1966 (Applicable Sections)

applicant's act or failure to act. Any payment shall be in full satisfaction of any further claim against the United States, the Department of Defense, and the Departments and Agencies referred to in Section IV.B., above, arising out of the suspension, revocation, or denial of a clearance. Any claim shall be forever barred unless it is filed within one year after the date such claim first accrues, or within one year of the final disposition of the case, whichever is later, *Provided*, a claim for reimbursement may be filed under this Section within one year from the effective date of this Directive where the applicant filed a claim under reference (b), but was denied solely on the ground that the clearance determination which resulted in the loss of earnings was not unjustified.

G. Approved claims against the Department of Defense shall be forwarded to the Department of the Army for payment from "Claims, Defense" Appropriation, in the same manner that Federal tort claims are currently processed under reference (d).

Appendix G

Executive Order 10865

Safeguarding Classified Information Within Industry

WHEREAS it is mandatory that the United States protect itself against hostile or destructive activities by preventing unauthorized disclosures of classified information relating to the national defense; and

WHEREAS it is a fundamental principle of our Government to protect the interests of individuals against unreasonable or unwarranted encroachment; and

WHEREAS I find that the provisions and procedures prescribed by this order are necessary to assure the preservation of the integrity of classified defense information and to protect the national interest; and

WHEREAS I find that those provisions and procedures recognize the interests of individuals affected thereby and provide maximum possible safeguards to protect such interest:

NOW, THEREFORE, under and by virtue of the authority vested in me by the Constitution and statutes of the United States, and as President of the United States and as Commander in Chief of the armed forces of the United States, it is hereby ordered as follows:

SECTION 1.(a) The Secretary of State, the Secretary of Defense, the Commissioners of the Atomic Energy Commission, the Administrator of the National Aeronautics and Space Administration, and the

Administrator of the Federal Aviation Agency, respectively, shall, by regulation, prescribe such specific requirements, restrictions, and other safeguards as they consider necessary to protect (1) releases of classified information to or within United States industry that relate to bidding on, or the negotiation, award, performance, or termination of, contracts with their respective agencies, and (2) other releases of classified information to or within industry that such agencies have responsibility for safeguarding. So far as possible, regulations prescribed by them under this order shall be uniform and provide for full cooperation among the agencies concerned.

(b) Under agreement between the Department of Defense and any other department or agency of the United States, including, but not limited to, those referred to in subsection (c) of this section, regulations prescribed by the Secretary of Defense under subsection (a) of this section may be extended to apply to protect releases (1) of classified information to or within United States industry that relate to bidding on, or the negotiation, award, performance, or termination of, contracts with such other department or agency, and (2) other releases of classified information to or within industry which such other department or agency has responsibility for safeguarding.

(c) When used in this order, the term "head of a department" means the Secretary of State, the Secretary of Defense, the Commissioners of the Atomic Energy Commission, the Administrator of the National Aeronautics and Space Administration, the Administrator of the Federal aviation Agency, and, in sections 4 and 8, includes the Attorney General. The term "department" means the Department of State, the Department of Defense, and the Atomic Energy Commission, the National Aeronautics and Space Administration, the Federal Aviation Agency, and, in sections 4 and 8, includes the Department of Justice.

Executive Order No. 10865

SECTION 2. An authorization for access to classified information may be granted by the head of a department or his designee, including, but not limited to, those officials named in section 8 of this order, to an individual, hereinafter termed an "applicant", for a specific classification category only upon a finding that it is clearly consistent with the national interest to do so.

SECTION 3. Except as provided in section 9 of this order, an authorization for access to a specific classification category may not be finally denied or revoked by the head of a department or his designee, including, but not limited to, those officials named in section 8 of this order, unless the applicant has been given the following:

(1) A written statement of the reasons why his access authorization may be denied or revoked, which shall be as comprehensive and detailed as the national security permits.

(2) A reasonable opportunity to reply in writing under oath or affirmation to the statement of reasons.

(3) After he has filed under oath or affirmation a written reply to the statement of reasons, the form and sufficiency of which may be prescribed by regulations issued by the head of the department concerned, an opportunity to appear personally before the head of the department concerned on his designee, including, but not limited to, those officials named in section 8 of this order, for the purpose of supporting his eligibility for access authorization and to present evidence on his behalf.

(4) A reasonable time to prepare for that appearance.

(5) An opportunity to be represented by counsel.

(6) An opportunity to cross-examine persons either orally or through written interrogatories in accordance with section 4 on matters not relating to the characterization in the statement of reasons of any organization or individual other than the applicant.

(7) A written notice of the final decision in his case which, if adverse, shall specify whether the head of the department or his designee, including, but not limited to, those officials named in section 8 of this order, found for or against him with respect to each allegation in the statement of reasons.

SECTION 4. (a) An applicant shall be afforded an opportunity to cross-examine persons who have made oral or written statements adverse to the applicant relating to a controverted issue *except* that any such statement may be received and considered without affording such opportunity in the circumstances described in either of the following paragraphs:

(1) The head of the department supplying the statement certifies that the person who furnished the information is a confidential informant who has been engaged in obtaining intelligence information for the Government and that disclosure of his identity would be substantially harmful to the national interest.

(2) The head of the department concerned or his special designee for that particular purpose has preliminarily determined, after considering information furnished by the investigative agency involved as to the reliability of the person and the

accuracy of the statement concerned, that the statement concerned appears to be reliable and material, and the head of the department or such special designee has determined that failure to receive and consider such statement would, in view of the level of access sought, be substantially harmful to the national security and that the person who furnished the information cannot appear to testify (A) due to death, severe illness, or similar cause, in which case the identity of the person and the information to be considered shall be made available to the applicant, or (B) due to some other cause determined by the head of the department to be good and sufficient.

(b) Whenever procedures under paragraphs (1) or (2) of subsection (a) of this section are used (1) the applicant shall be given a summary of the information which shall be as comprehensive and detailed as the national security permits, (2) appropriate consideration shall be accorded to the fact that the applicant did not have an opportunity to cross-examine such person or persons, and (3) a final determination adverse to the applicant shall be made only by the head of the department based upon his personal review of the case.

SECTION 5. (a) Records compiled in the regular course of business, or other phusical evidence other than investigative reports, may be received and considered subject to rebuttal without authenticating witnesses, provided that such information has been furnished to the department concerned by an investigative agency pursuant to its responsibilities in connection with assisting the head of the department concerned to safeguard classified information within industry pursuant to this order.

(b) Records compiled in the regular course of business, or other physical evidence other than investigative reports,

relating to a controverted issue which, because they are classified, may not be inspected by the applicant, may be received and considered provided that: (1) the head of the department concerned or his special designee for that purpose has made a preliminary determination that such physical evidence appears to be material, (2) the head of the department concerned or such designee has made a determination that failure to receive and consider such physical evidence would, in view of the level of access sought, be substantially harmful to the national security, and (3) to the extent that the national security permits, a summary or description of such physical evidence is made available to the applicant. In every such case, information as to the authenticity and accuracy of such physical evidence furnished by the investigative agency involved shall be considered. In such instances a final determination adverse to the applicant shall be made only by the head the department based upon his personal review of the case.

SECTION 6. Because existing law does not authorize the Department of State, the Department of Defense, or the National Aeroneutics and Space Administration to subpoena witnesses, the Secretary of State, the Secretary of Defense, or the Administrator of the National Aeronautics and Space Administration, or his representative, may issue, in appropriate cases, invitations and requests to appear and testify in order that the applicant may have the opportunity to cross-examine as provided by this order. So far as the national security permits, the head of the investigative agency involved shall cooperate with the Secretary or the Administrator, as the case may be, in identifying persons who have made statements adverse to the applicant and in assisting him in making them available for cross-examination. If a person so invited is an officer or employee of the executive branch of the Government or a member of the armed forces of the United States, the head of the department or agency concerned shall cooperate in making that person available for cross-examination.

SECTION 7. Any determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.

SECTION 8. Except as otherwise specified in the preceding provisions of this order, any authority vested in the head of a department by this order may be delegated to the

(1) Under Secretary of State of a Deputy Under Secretary of State, in the case of authority vested in the Secretary of State;

(2) Deputy Secretary of Defense or an Assistant Secretary of Defense, in the case of authority vested in the Secretary of Defense;

(3) General Manager of the Atomic Energy Commission, in the case of authority vested in the Commissioners of the Atomic Energy Commission;

(4) Deputy Administrator of the National Aeronautics and Space Administration, in the case of authority vested in the Administrator of the National Aeronautics and Space Administration;

(5) Deputy Administrator of the Federal Aviation Agency, in the case of authority vested in the Administrator of the Federal Aviation Agency; or

(6) Deputy Attorney General or an Assistant Attorney General, in the case of authority vested in the Attorney General.

SECTION 9. Nothing contained in this order shall be deemed to limit or affect the responsibility and powers of the head of a department to deny or revoke access to a

specific classification category if the security of the nation so requires. Such authority may not be deleged and may be exercised only when the head of a department determines that the procedures prescribed in sections 3, 4, and 5 cannot be invoked consistently with the national security and such determination shall be conclusive.

DWIGHT D. EISENHOWER

THE WHITE HOUSE
February 20, 1960

Appendix H

5220.6, Jul 28, 60
(Att 1, Jun 14, 63, to Encl 1)

Executive Order 10909

Amendment of Executive Order No. 10865, Safeguarding Classified Information Within Industry

By virtue of the authority vested in me by the Constitution and statutes of the United States, and as President of the United States, and as Commander in Chief of the armed forces of the United States, Executive Order No. 10865 of February 20, 1960 (25 F.R. 1583), is hereby amended as follows:

Section 1. Section 1(c) is amended to read as follows:

"(c) When used in this order, the term 'head of a department' means the Secretary of State, the Secretary of Defense, the Commissioners of the Atomic Energy Commission, the Administrator of the National Aeronautics and Space Administration, the Administrator of the Federal Aviation Agency, the head of any other department or agency of the United States with which the Department of Defense makes an agreement under subsection (b) of this section, and, in sections 4 and 8, includes the Attorney General. The term 'department' means the Department of State, the Department of Defense, the Atomic Energy Commission, the National Aeronautics and Space Administration, the Federal Aviation Agency, any other department or agency of the United States with which the Department of Defense makes an agreement under subsection (b) of this section, and, in sections 4 and 8, includes the Department of Justice."

Executive Order No. 10909

Sec. 2. Section 6 is amended to read as follows:

"Sec. 6. The Secretary of State, the Secretary of Defense, the Administrator of the National Aeronautics and Space Administration, the Administrator of the Federal Aviation Agency, or his representative, or the head of any other department or agency of the United States with which the Department of Defense makes an agreement under section 1(b), or his representative, may issue, in appropriate cases, invitations and requests to appear and testify in order that the applicant may have the opportunity to cross-examine as provided by this order. Whenever a witness is so invited or requested to appear and testify at a proceeding and the witness is an officer or employee of the executive branch of the Government or a member of the armed forces of the United States, and the proceeding involves the activity in connection with which the witness is employed, travel expenses and per diem are authorized as provided by the Standardized Government Travel Regulations or the Joint Travel Regulations, as appropraite. In all other cases (including non-Government employees as well as officers or employees of the executive branch of the Government or members of the armed forces of the United States not covered by the foregoing sentence), transportation in kind and reimbursement for actual expenses are authorized in an amount not to exceed the amountpayable under standardized Government Travel Regulations. An officer or employee of the executive branch of the Government or a member of the armed forces of the United States who is invited or requested to appear pursuant to this paragraph shall be deemed to be in the performance of his official duties. So far as the national security permits, the head of the investigative agency involved shall cooperate with the Secretary, the Administrator, or the head of the other department or agency, as the case may be, in indentifying persons who have made statements adverse to the applicant and in assisting him in making them available for

cross-examination. If a person so invited is an officer or employee of the executive branch of the Government or a member of the armed forces of the United States, the head of the department or agency concerned shall cooperate in making that person available for cross-examination."

Sec. 3. Section 8 is amended by striking out the word"or" at the end of clause(5), by striking out the period at the end of clause (6) and inserting "; or" in place thereof, and by adding the following new clause at the end thereof:

"(7) the deputy of that department, or the principal assistant to the head of that department, as the case may be, in the case of authority vested in the head of a department or agency of the United States with which the Department of Defense makes an agreement under section 1(b)."

DWIGHT D. EISENHOWER

THE WHITE HOUSE

January 17, 1961.

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In the Supreme Court of the United States

OCTOBER TERM, 1973

WALLACE CUTLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Claims (Pet. App. 12a-18a) is unreported.

JURISDICTION

The judgment of the Court of Claims was entered on June 20, 1973. The petition for a writ of certiorari was filed on September 7, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTION PRESENTED

Whether petitioner's claim for monetary reimbursement for lost wages due to a denial of a security clearance in 1957, filed in April 1972, almost six years after the grant of authorization for access to classified material in June 1966, is barred by a Defense Department Directive, issued in December 1966, which provides a one-year limitation on the filing of such claims.

STATUTES INVOLVED

The pertinent regulations are set forth in petitioner's Appendix 19a-36a.

STATEMENT

In June, 1957, the Department of Defense notified petitioner, then employed by Emerson Radio and Phonograph Corporation, of the denial of his application for a "secret" security clearance, the reasons for the denial and his rights of appeal.

Following the termination of his employment, petitioner appealed the denial of his security clearance. After hearing, a Department of Defense Hearing Board reaffirmed the denial. Petitioner then requested reconsideration by the Department of Defense Review Office, contending that the procedures followed in his case failed to meet the standards required by *Greene* v. *McElroy,* 360 U.S. 474. During the pendency of petitioner's appeal, the President, on February 20, 1960, issued Executive Order No. 10865, which authorized the creation of a security clearance program embodying the procedural safeguards required by the *Greene* decision. Pursuant to the President's Executive Order, the Secretary of Defense promulgated Department of Defense Directive 5220.6, July 28, 1960, which cancelled and superseded former Department of Defense Directive 5220.6, February 2, 1955. Petitioner was thereafter notified that his case would be reprocessed pursuant to the procedures set forth in the new Department of Defense directive. Petitioner pursued the new procedures, and a security clearance was granted on June 22, 1966 (Pet. App. 13a).

Almost six years later, in April, 1972, petitioner submitted an administrative claim for monetary resti-

tution under a Department of Defense regulation providing for reimbursement of earnings lost by a contractor employee who had been inequitably denied a security clearance. The Department of Defense directive then in effect, No. 5220.6, issued on December 7, 1966 (subparagraph F, Pet. App. 25a), provided a one-year limitation on the filing of such claims. Accordingly, on May 5, 1972, the Department of Defense denied the claim as time barred, since petitioner's claim had accrued almost six years earlier (Pet. App. 13a-14a).

Petitioner then filed a petition in the Court of Claims, alleging that his claim for monetary restitution was not time barred as it was governed by the 1955 Department of Defense directive which was in effect when his security clearance was denied, and which contained no provision limiting the time in which a claim had to be submitted. The Court of Claims dismissed the suit as time barred. The court concluded that the 1966 directive was controlling since "we see no reason why the Department which gave the right cannot decide to circumscribe it with this reasonable and appropriate procedural requirement," and petitioner "had a reasonable time, after the 1966 regulation became operative, to present his claim—but he failed by the widest of margins" (Pet. App. 15a-16a, 18a).

ARGUMENT

The decision of the Court of Claims is correct, and fully consistent with *Greene* v. *United States,* 376 U.S. 149. Review by this Court is unwarranted.

In *Greene* v. *United States, supra,* this Court held that a claimant seeking monetary reimbursement under the same program as petitioner was entitled

to relief under the 1955 regulation as opposed to the 1960 regulation because his claim had been filed 6 months *before* the 1960 regulation went into effect, and furthermore, because there had been a significant change in the *substantive* requirements for restitution.[1] The Court went on to say:

> We do not suggest that a claimant, seeking damages under a former regulation, need not resort to administrative proceedings under a new regulation where the new regulation contains essentially the same substantive requirements as its predecessor.

Greene v. *United States,* 376 U.S. at 163. As the Court of Claims correctly noted, there is no basis in *Greene* to excuse petitioner from complying with the purely *procedural* condition of the 1966 regulation that a claim must be filed within one year of final disposition of a case. Moreover, petitioner did not assert his right to restitution until almost six years *after* the promulgation of the 1966 directive[2] (Pet. App. 15a, 17a).

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[1] The change in the 1960 directive created an additional burden on a claimant of showing at a later time that if he had been afforded fair procedures initially he would have been able to demonstrate that he was entitled to a security clearance. The 1955 directive, which was in effect when Greene's rights matured and were asserted, provided that governmental liability follows a final determination favorable to the claimant. The Court held that under these circumstances retroactive application of the 1960 directive would be unjustified. *Greene* v. *United States,* 376 U.S. at 159-163.

[2] Petitioner's allegation that he was dismissed from employment at Emerson was contested by the government. There are few if any records available to resolve this conflict. As the Court of Claims noted, petitioner's belated presentation was the cause of this dilemma, and, had he filed his claim within the time required in the 1966 directive, the means of settling

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1973.

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the controversy might have been available. Although not reaching the government's defense of laches, the Court of Claims indicated that the delay in filing the claim prejudiced the government, for it no longer had these records available (Pet. App. 16a, n. 9). Petitioner's delay in filing the claim, and the resulting prejudice to the government, under the doctrine of laches, is an independent ground for barring petitioner from obtaining the requested relief. *Whitney* v. *Fox,* 166 U.S. 637, 647; *Abraham* v. *Ordway,* 158 U.S. 416, 420.

[illegible]-1973-10